METOYER v. STATE

2022 OK CR 27
Case Number: F-2020-431
Decided: 10/20/2022
DEMARCO DANZELL METOYER, Appellant v. STATE OF OKLAHOMA, Appellee

Cite as: 2022 OK CR 27, __ __

SUMMARY OPINION

HUDSON, VICE PRESIDING JUDGE:

¶1 Appellant, Demarco Danzell Metoyer, was tried and convicted by a jury in the District Court of Tulsa County, Case No. CF-2016-5998, of two counts of First Degree Manslaughter, After Former Conviction of Two or More Felonies, in violation of 21 O.S.2011, § 711(1). The jury imposed a sentence of twenty years imprisonment on each count.

¶2 The Honorable Sharon K. Holmes, District Judge, pronounced judgment and sentence in accordance with the jury's verdicts but imposed a $600.00 fine on each count as additional punishment. Judge Holmes ordered both sentences to run concurrently and imposed various costs and fees. [1]

¶3 Metoyer now appeals and alleges eleven propositions of error. After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that no relief is required under the law and evidence except with respect to the fines imposed. Appellant's judgment and sentence is **AFFIRMED** except the $600.00 fine imposed for each count is **STRICKEN**.

¶4 We begin with Proposition IX, the sole ground in this appeal warranting an extended discussion and for which publication is warranted.

THE FINES IMPOSED BY THE TRIAL COURT AS ADDITIONAL PUNISHMENT WERE UNAUTHORIZED
(Proposition IX)

¶5 In Proposition IX, Appellant challenges the trial court's imposition of a $600.00 fine as additional punishment on each count at formal sentencing. The record shows the jury was correctly instructed that it could impose on each count imprisonment for a term of twenty years to life and a fine not exceeding $10,000.00. The jury's sentencing verdicts, however, do not include a fine, only imprisonment. No objection was made to the trial court's imposition of a fine at formal sentencing. Our review is therefore limited to plain error. *See Hubbard v. State*, 2002 OK CR 8, ¶ 7, 45 P.3d 96, 99. As discussed below, Appellant shows plain error warranting relief on this issue.

¶6 Appellant complains on appeal that the trial court had no authority to impose a fine as additional punishment in light of the jury's sentencing verdict. Appellant cites 22 O.S.2011, § 926.1 which states:

> In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as hereinafter provided.

¶7 In the present case, the jury assessed and declared Appellant's sentence at the conclusion of the bifurcated sentencing stage. No objection was made to the jury's sentencing verdict when it was returned. The jury was properly instructed on the range of punishment to include not only a term of imprisonment but also a fine. *See* 21 O.S.2011, § 51.1(B); 21 O.S.2011, § 64(B); 21 O.S.2011, § 715.[2] Despite this fact, the jury's sentencing verdict included no fine.

¶8 For over forty years, we have interpreted § 926.1 in the following way. So long as a jury's sentencing verdict is within statutory limits, and is otherwise legally proper, the trial judge has the authority to suspend a sentence in whole or part under 22 O.S.2021, § 991a but the court "may not impose a sentence different from that set by the jury." *Howell v. State*, 1981 OK CR 82, ¶ 9, 632 P.2d 1223, 1225. *E.g.*, *Luker v. State*, 1976 OK CR 135, ¶ 12, 552 P.2d 715, 719 ("[W]here the jury declare the punishment in their verdict within the limitations fixed by law, the district courts of this State must render a judgment according to such verdict and are without authority to modify the punishment assessed by the jury in pronouncing judgment upon the conviction."); *Fleming v. State*, 1988 OK CR 163, ¶ 10, 760 P.2d 208, 210 (no abuse of discretion where the trial court considered and rejected the defendant's request for a suspended sentence "then followed its statutory duty and imposed the sentence set by the jury");[3] *Luna v. State*, 2016 OK CR 27, ¶ 18, 387 P.3d 956, 961-62, *overruled on other grounds*, *White v. State*, 2021 OK CR 29, ¶ 8, 499 P.3d 762, 767 ("Section 926.1 vests the jury with authority to render punishment. Once a defendant elects a jury trial and the jury decides punishment within the applicable range of punishment in its verdict, the trial court must impose the jury's punishment verdict."). This interpretation is consistent with neighboring statutes addressing the trial court's duties when the jury fails to agree, or does not declare, such punishment by their verdict or otherwise sets punishment greater than the highest limit declared by law for the offense. *See* 22 O.S.2021, §§ 927.1-928.1.

¶9 We have identified the right to jury sentencing contained within § 926.1 as being so fundamental that "[t]he defendant may not unilaterally waive the assessment of punishment by a jury which is able to agree." *Case v. State*, 1976 OK CR 250, ¶ 25, 555 P.2d 619, 625. "[T]he state in our adversary criminal justice system has a valid and legitimate interest in trying its cases before that body which history shows and the framers of our Constitution knew produced the fairest end result--the jury." *Id.*, 1976 OK CR 250, ¶ 26, 555 P.2d at 625. *See Love v. State*, 2009 OK CR 20, ¶ 3, 217 P.3d 116, 117 (holding that any proposed waiver of jury punishment must be joined by both the prosecutor and trial judge). A defendant thus has no right to have a jury decide his guilt and then have a judge decide his sentence. *Case*, 1976 OK CR 250, ¶ 26, 555 P.2d at 625; *Reddell v. State*, 1975 OK CR 229, ¶ 30, 543 P.2d 574, 581-82.

¶10 In *Fite v. State*, 1993 OK CR 58, 873 P.2d 293, this Court addressed the power of a trial court to impose a monetary fine in the face of a jury's sentencing verdict. In *Fite*, the jury imposed a $100,000 fine for the defendant's conviction of unlawful cultivation of marijuana. *Id.* at ¶ 1, 873 P.2d at 294. Defendant's sentence was enhanced, however, using the wrong enhancement provision. *Id.* at ¶ 4, 873 P.2d at 294. The correct enhancement provision was 21 O.S. § 51(B) which, of course, does not contain a fine. *Fite*, 1993 OK CR 5, ¶¶ 7-8, 873 P.2d at 295. This meant the general fine provision in 21 O.S. § 64 was applicable. *Fite,* 1993 OK CR 58, ¶¶ 8-9, 873 P.2d at 295. We ultimately modified the $100,000 fine imposed by the jury to $10,000--the maximum fine authorized under § 64. *Fite*, 1993 OK CR 58, ¶ 11, 873 P.2d at 295.

¶11 The version of § 64 governing *Fite* authorized the "court" to impose a fine, not the jury. *Fite*, 1993 OK CR 58, ¶ 9, 873 P.2d at 295. *Fite* overruled a prior case--*Brown v. State*, 1957 OK CR 70, 314 P.2d 362, 366--which interpreted the then-existing sentencing statutes and held *inter alia* that "where a defendant is tried and sentenced by the jury, the court may not impose a fine under § 64." *Fite*, 1993 OK CR 58, ¶ 9, 873 P.2d at 295. Because *Brown* allowed a defendant who pled guilty to be punished more harshly than a defendant who was convicted by a jury, and because the Legislature had enacted 22 O.S. § 991a which authorized the trial court "in certain circumstances, to impose additional, or alternative, sanctions as prescribed by law[,]" we held the following in *Fite*:

> Like § 991a, § 64 should be given effect and the trial court should be allowed to impose an appropriate fine under § 64 even when the defendant is sentenced to a term of imprisonment by the jury. Of course, nothing in § 64, or in this opinion, entitled the trial court to deviate from the term of imprisonment actually imposed by the jury. Accordingly, we overrule *Brown v. State* . . . to the extent that it is inconsistent with this opinion. Further, we modify the fine imposed on Fite from $100,000 to $10,000, the maximum permissible fine under § 64.

Fite, 1993 OK CR 58, ¶ 11, 873 P.2d at 295.

¶12 Since *Fite*, we have been inconsistent in our unpublished decisions on whether the trial court at formal sentencing may impose a fine. In *Frye v. State*, No. F-2009-998, slip op. (Okl. Cr. May 5, 2011) (unpublished), we held that the trial court imposed an unauthorized $1,000 fine at sentencing after the jury was properly instructed on the option of ordering the defendant to pay a monetary fine but declined to assess any fine in its sentencing verdict. The State conceded that imposition of the fine under these circumstances was error. We cited *Howell*, 1981 OK CR 82, ¶ 9, 632 P.2d at 1225 and *Luker*, 1976 OK CR 135, ¶ 12, 552 P.2d at 719 for the proposition that a trial judge may not impose a sentence different than that set by the jury. In *Mixon v. State*, No. F-2017-902, slip op. (Okl. Cr. Nov. 15, 2018) (unpublished) and *Coke v. State*, No. F-2018-384, slip op. (Okl. Cr. May 23, 2019) (unpublished), we found no plain error on the same basic facts and affirmed the trial court's imposition of fines in each case. *Mixon* and *Coke* collectively relied upon *Fite* and 22 O.S. § 991a.

¶13 *Fite* is distinguishable from the present case. The jury in *Fite* actually imposed a fine that required modification on appeal by this Court because the defendant was sentenced under the wrong enhancement statute. Further, 21 O.S.1991, § 64 was amended after the trial proceedings in *Fite* to authorize either "the court *or* a jury" to impose a fine not exceeding $10,000 in addition to the imprisonment prescribed. 21 O.S.Supp.1993, § 64(B). This version of the general enhancement statute remains in force today and governs Appellant's case. *See* 21 O.S.2021, § 64(B) (statutory language reprinted in footnote 2, *supra*).

¶14 The version of § 64 in force at the time of *Fite* was a major factor behind *Fite*'s ultimate holding. *Fite*, 1993 OK CR 58, ¶¶ 9 & 11, 873 P.2d at 295. The Legislature's subsequent amendment of § 64 authorizing the court *or the jury* to impose a fine in addition to the imprisonment prescribed is a clear catalyst for departure from *Fite*. *See Lewis v. City of Oklahoma City*, 2016 OK CR 12, ¶ 2, 387 P.3d 899, 900 ("We presume the Legislature 'has not created an absurdity or done a vain or useless act.'" (quoting *State v. District Court of Okla. County*, 2007 OK CR 3, ¶ 11, 154 P.3d 84, 86)). No longer does the "anomalous situation" described in *Fite* exist where a defendant who pleads guilty is subject to the general fine provision, and thus greater punishment, compared to a defendant who is convicted and sentenced with priors by a jury. *Fite*, 1993 OK CR 58, ¶ 10, 873 P.2d at 295. In both scenarios today the defendant is subject to imposition of a fine under § 64. The question becomes simply *who* has the authority to impose a fine. Nothing in the plain language of § 991a suggests that the trial court's post-verdict sentencing powers include imposition of a fine (1) where the jury declines to impose a fine upon proper instruction *or* (2) where the jury actually imposed a fine. Whereas the plain language of § 926.1 remains clear and unmistakable: when the jury has assessed and declared the punishment in their verdict "within the limitations fixed by law . . . the court **shall** render a judgment according to such verdict[.]" 22 O.S.2021, § 926.1 (emphasis added). *Fite* moreover said very little about this provision in its analysis, instead referencing in passing 22 O.S. § 926 which was addressed in *Brown* but ultimately repealed in 1999 and re-enacted as § 926.1.

¶15 "We construe statutes together, avoiding any interpretation which would render any part of them useless, superfluous or inconsistent, and will try to reconcile potentially conflicting provisions." *Leftwich v. State*, 2015 OK CR 5, ¶ 15, 350 P.3d 149, 155. Our review of the governing Oklahoma statutes shows that a jury's sentencing verdict is not merely a recommendation that informs the trial court's ultimate sentencing determination. Where, as here, the jury upon proper instruction declines to impose a fine, Oklahoma law preempts the trial court from imposing a fine.[4] The trial court should follow the jury's sentencing verdict unless it is otherwise legally infirm. 21 O.S.2021, § 64; 22 O.S.2021, § 926.1. The authority granted in § 991a(A)(2) for the trial judge to impose a fine is subsumed in this scenario by the jury's sentencing verdict but applies for guilty pleas, bench trials and, of course, those instances where the jury fails to assess and declare punishment. *See* 22 O.S.2021, § 927.1.

¶16 This view is based on the primacy of jury sentencing expressed by the Legislature in § 64 and § 926.1. True, the Legislature has provided several ways for courts to exercise their discretion post-verdict with respect to sentencing. *See* 22 O.S.2021, § 927.1 (authorizing the trial court to "assess and declare the punishment" when the jury "fails to agree on the punishment to be inflicted, or does not declare such punishment by their verdict"); 22 O.S.2021, § 982a (allowing for modification of sentence by trial court of sentences imposed pursuant to a plea agreement or jury verdict with consent of the district attorney); 22 O.S.2021, § 991a(A)(1) (allowing the trial court to *inter alia* "[s]uspend the execution of sentence in whole or in part, with or without probation"); 22 O.S.2021, § 994 (providing for suspension of judgment and sentence by the trial court upon request by the defendant within ten days of a final order of the Court of Criminal Appeals). *See also* 22 O.S.2021, § 1066 (providing that the Court of Criminal Appeals may modify a sentence on appeal). None of these provisions, however, explicitly state that the jury's sentencing verdict is merely a recommendation or otherwise non-binding on the trial court. Nor does any other statute. Indeed, we have held that advisory sentencing juries are unauthorized in Oklahoma, at least in the

context of guilty pleas. *Borden v. State*, 1985 OK CR 151, ¶ 7, 710 P.2d 116, 118. The same should obviously apply in the context of jury trials when the jury assesses and declares punishment in their verdict. Based upon the foregoing, we find plain error and vacate the trial court's imposition of the fines in this case. *Fite v. State*, 1993 OK CR 58, 873 P.2d 293 is overruled to the extent it is inconsistent with this opinion. Proposition IX is granted.

APPELLANT'S REMAINING CLAIMS
(Propositions I-VIII and X-XI)

¶17 Metoyer's remaining claims are straightforward to resolve and allege the following propositions of error: (1) the accumulation of error deprived him of due process (Proposition I); (2) insufficient evidence was presented at trial to support his convictions (Proposition II); (3) the trial court failed to fairly and accurately instruct the jury on the crime of first degree misdemeanor manslaughter (Proposition III); (4) the trial court failed to fairly and accurately instruct the jury on the underlying misdemeanor crime of Driving Under the Influence (Proposition IV); (5) the trial court failed to fairly and accurately instruct the jury on causation (Proposition V); (6) the trial court erred in admitting the audio recording of his interview with Trooper Raines because Appellant's statements were coerced and involuntary (Proposition VI); (7) the trial court erred in admitting the audio recordings of his interview with Trooper Raines because Appellant was in custody and the record fails to show he was advised of the *Miranda* warnings (Proposition VII); (8) the warrantless blood draw violated the Fourth Amendment and the trial court erred in admitting evidence of the subsequent blood analysis (Proposition VIII); (9) prosecutorial misconduct deprived him of a fair trial and due process (Proposition X); and (10) trial counsel was constitutionally ineffective (Proposition XI).

¶18 **Proposition I.** We deny relief for alleged cumulative error. *Mahdavi v. State*, 2020 OK CR 12, ¶ 49, 478 P.3d 449, 461. Proposition I is denied.

¶19 **Proposition II.** Sufficient evidence was presented at trial to support both alternative theories of first degree misdemeanor manslaughter alleged in this case. Taken in the light most favorable to the State, sufficient evidence was presented at trial to allow any rational trier of fact to conclude beyond a reasonable doubt that Appellant was driving under suspension at the time of the collision, and that his conduct in driving while under suspension was a substantial factor in bringing about both victims' deaths. Sufficient evidence was also presented at trial to show alternatively that Appellant plowed into the back of Linda Cervantes's car while driving under the influence of marijuana as charged in this case and that Appellant's commission of driving while under the influence of marijuana was a substantial factor in causing both victims' deaths. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Davis v. State*, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111; *State v. Ceasar*, 2010 OK CR 15, ¶¶ 9-13, 237 P.3d 792, 794-95; 21 O.S.2011, § 711(1); 47 O.S.Supp.2016, § 6-303 (effective Jan. 1, 2016); 47 O.S.Supp.2013, § 11-902(A)(3). Proposition II is denied.

¶20 **Proposition III.** Because Appellant did not object to Instruction No. 16 below or request any alterations, our review is for plain error only. *Runnels v. State*, 2018 OK CR 27, ¶ 18, 426 P.3d 614, 619. Appellant must therefore show an actual or obvious error affecting his substantial rights. Even then, we only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.* Appellant fails to show actual or obvious error.

¶21 Instruction No. 16, which set forth the elements of first degree misdemeanor manslaughter, was taken verbatim from OUJI-CR (2d) 4-94. The definitions contained in Instruction No. 17 were likewise taken directly from the uniform instructions, specifically OUJI-CR (2d) 4-108. Reviewing the total instructions, particularly the OUJI-CR (2d) 4-60 causation instruction provided to the jury in Instruction No. 15, there is nothing confusing let alone overbroad or inaccurate about the language used in defining first degree misdemeanor manslaughter and in detailing what was required to prove causation. The instructions fairly and accurately stated the governing law. There is no reasonable likelihood the jury could have convicted Appellant based on a mere finding that the deaths were caused by the common element of driving as alleged by Appellant. There was thus no error, let alone plain error, from the instructions. *See Runnels*, 2018 OK CR 27, ¶ 19, 426 P.3d at 619 ("Instructions are sufficient where they accurately state the applicable law."); *Mitchell v. State*, 2018 OK CR 24, ¶ 22, 424 P.3d 677, 684 ("This Court will deny relief on a claim of jury instruction error when the jury instructions, as a whole, accurately state the applicable law."); *Harris v. State*, 2007 OK CR 28, ¶ 6, 164 P.3d 1103, 1108 ("Trial courts should use both mandatory and recommended uniform instructions which accurately state the applicable law."). Proposition III is denied.

¶22 **Proposition IV.** There was no abuse of discretion from the trial court's definition in Instruction No. 16 of the underlying misdemeanor crime of driving under the influence. The elements of the crime contained therein accurately stated the governing law. *See Barnes v. State*, 2017 OK CR 26, ¶ 22, 408 P.3d 209, 217; *Sanders v. State*, 2002 OK CR 42, ¶ 13, 60 P.3d 1048, 1051, *overruled on other grounds*, *Stewart v. State*, 2019 OK CR 6, ¶ 8, 442 P.3d 158, 161; 47 O.S.2011, § 10-104(B); 47 O.S.Supp.2013, § 11-902(A)(3). Proposition IV is denied.

¶23 **Proposition V.** Instruction No. 15 was taken directly from the OUJI instructions and accurately stated the law concerning causation. There is nothing confusing let alone overbroad or inaccurate about the language used. The phrase "substantial factor" as used in this instruction is self-explanatory and does not require additional explanation. Indeed, no further definition or explanation was required for any portion of the instruction. There was no error, plain or otherwise. *See* OUJI-CR (2d) 4-60; 12 O.S.2011, § 577.2; *Williams v. State*, 2021 OK CR 19, ¶ 4, 496 P.3d 621, 623; *A.O. v. State*, 2019 OK CR 18, ¶ 7 n.4, 447 P.3d 1179, 1181 n.4; *Ceasar*, 2010 OK CR 15, ¶¶ 10-11, 237 P.3d at 794-95. Proposition V is denied.

¶24 **Proposition VI.** No *Jackson v. Denno*, 378 U.S. 368 (1964) hearing was held because Appellant never objected to the admissibility of the interview. "Failure to interpose a Motion to Suppress with a timely objection constitutes a waiver and preserves nothing for review on appeal." *Jones v. State*, 1987 OK CR 183, ¶ 7, 742 P.2d 1152, 1154. "Because Appellant did not object to the voluntariness of his custodial statements, the trial court properly admitted the statements without a *Jackson v. Denno* hearing and no error occurred." *Washington v. State*, 1999 OK CR 22, ¶ 34, 989 P.2d 960, 972.

¶25 Review of the audio recording of Appellant's interview at the hospital, along with Trooper Raines's testimony, shows Appellant's noncustodial statements were not the product of coercion and were knowingly and voluntarily made. Trooper Raines specifically denied threatening Appellant or making any promises in exchange for the statement. Nothing on the audio recording suggests coercion or involuntariness based upon the withholding of medical care or any other factor. Under these circumstances, there was no error, plain or otherwise, from the admission of State's Exhibit 22. Proposition VI is denied.

¶26 **Proposition VII.** Based on the total record, Appellant fails to show he was in custody during his interview with Trooper Raines either due to formal arrest or restraint on freedom. This despite the labels on the form affidavit used by Trooper Jackson to facilitate the warrantless blood draw. *Miranda*[5] warnings were not required because this was a non-custodial interview. Appellant also fails to show any coercion whatsoever during the interview. Under the total circumstances, there was no error, plain or otherwise. *See Mason v. State*, 2018 OK CR 37, ¶¶ 18-20, 433 P.3d 1264, 1270-71 (and cases cited and discussed therein). Proposition VII is denied.

¶27 **Proposition VIII.** Appellant failed to make a contemporaneous objection to the admission of the blood-draw evidence at trial, thus waiving review on appeal for all but plain error. *Cochlin v. State*, 2020 OK CR 23, ¶ 9, 479 P.3d 534, 537. Appellant fails to show actual or obvious error from the trial court's admission of this evidence. "Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *Missouri v. McNeely*, 569 U.S. 141, 156 (2013). "This pronouncement means that in addition to having probable cause to support the search, police must also obtain a warrant unless there is some exigent circumstance where the needs of law enforcement [are] so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Stewart v. State*, 2019 OK CR 6, ¶ 5, 442 P.3d 158, 161 (internal quotation omitted).

¶28 The record shows that Trooper Jackson had probable cause to believe evidence showing a DUI crime would be found in Appellant's blood. Further, Trooper Jackson "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence[.]'" *Stewart*, 2019 OK CR 6, ¶ 4, 442 P.3d at 161 (quoting *Schmerber v. California*, 384 U.S. 757, 770-71 (1966)). The record further shows this was a serious crime involving a fatality accident and that the medical treatment Appellant was receiving had the potential to alter the results of any blood draw depending upon the medications given to him. The State has a vested interest in accurate results from its testing of the blood sample under these circumstances. "Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant." *Schmerber*, 384 U.S. at 771.

¶29 Appellant fails to show plain error because exigent circumstances existed to make the warrantless blood draw in this case objectively reasonable for Fourth Amendment purposes. Trooper Jackson also complied with 47 O.S.2011, § 10-104(B) because the record shows Appellant could be cited for a traffic offense, the accident resulted in the immediate death or great

bodily injury of two people and the blood draw commenced as soon as practicable after the accident occurred. The record does not support Appellant's claim that the trooper had sufficient time to obtain a search warrant without risking the destruction of relevant evidence that would be obtained from a contemporaneous blood test. Based on the exigent circumstances that informed Trooper Jackson's decision to proceed with the warrantless blood draw, there was no error plain or otherwise arising from the trial court's admission of this evidence. Proposition VIII is denied.

¶30 **Proposition X.** Appellant fails to show that he was denied a fundamentally fair trial in violation of due process by prosecutorial misconduct. There was no plain error. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Shaw v. State*, 2021 OK CR 33, ¶¶ 10-11, 500 P.3d 641, 644-45; *Mahdavi*, 2020 OK CR 12, ¶ 42, 478 P.3d at 460; *Lenard v. State*, 1990 OK CR 55, ¶ 11, 796 P.2d 636, 638; *Thomason v. State*, 1988 OK CR 249, ¶¶ 4-6, 763 P.2d 1182, 1183. Proposition X is denied.

¶31 **Proposition XI.** To prevail on an ineffective assistance of counsel claim, the defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See Harrington v. Richter*, 562 U.S. 86, 104 (2011) (discussing *Strickland* two-part standard). Appellant fails to show deficient performance or prejudice with any of his claims. We rejected in this appeal his instructional and evidentiary challenges as well as his prosecutorial misconduct claims. *See* Propositions III, IV, V, VI, VII, VIII & X.[6] Counsel was not ineffective for failing to raise meritless claims. *Mahdavi*, 2020 OK CR 12, ¶ 48, 478 P.3d at 460-61; *Logan v. State*, 2013 OK CR 2, ¶ 11, 293 P.3d 969, 975.

¶32 Appellant is also not entitled to an evidentiary hearing on his ineffective assistance of counsel claim which is based on non-record evidence. Appellant fails to show by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence. Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022); *Lamar v. State*, 2018 OK CR 8, ¶ 58, 419 P.3d 283, 298. Proposition XI is denied.

DECISION

¶33 The Judgment and Sentence of the district court is **AFFIRMED** except the $600.00 fine imposed for each count is **STRICKEN**. Appellant's application to supplement the record or, in the alternative, for evidentiary hearing is **DENIED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM
THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE SHARON K. HOLMES, DISTRICT JUDGE

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OPINION BY: HUDSON, V.P.J.
ROWLAND, P.J.: CONCUR
LUMPKIN, J.: SPECIAL CONCUR
LEWIS, J.: CONCUR IN PART/DISSENT IN PART
MUSSEMAN, J.: CONCUR

LUMPKIN, JUDGE: SPECIAL CONCUR:

¶1 I concur in the Court's decision to affirm the Judgment and Sentence and to strike the fines imposed for each count. I write separately to address Proposition IX and the judge's imposition of the fines.

¶2 This case reveals the misunderstanding created in the minds of our trial judges by this Court's use of imprecise language over the years. Cases from the early days of this Court are replete with the Court remanding cases back to the trial court when a judge did not follow the jury verdict on punishment in order for the judge to enter a sentence that conformed to the verdict of the jury. [1]

¶3 Then in the early 1970's, the language in opinions began to refer to the jury verdict as a recommendation. [2] This gave trial judges the impression they were the final sentencer instead of the jury. Over the years, the inconsistent use of terms has created confusion as to the role of the judge and the jury.

¶4 Having begun my practice of criminal law during the 1970's, I accepted the language that a jury's verdict on punishment was a recommendation. However, I was wrong to do so as a trial judge's authority in sentencing is set out by statute and the jury verdict is not just a recommendation, but a final judgment on punishment subject to specific statutory provisions regarding imposition of that verdict.

¶5 As this Court has done in the current opinion, our analysis should be guided by the interpretation of the current statutory scheme laid out by the Constitution and the Oklahoma Legislature. The Legislature has set out in 22 O.S.2011, § 926.1, that a "jury may, and shall upon the request of the defendant assess and declare the punishment". This statute places the responsibility on a defendant to request jury sentencing. There is no provision in the statutes stating that merely asking for a jury trial on the issue of guilt or innocence is also a request for jury sentencing. Thus to invoke the statutorily mandated sentencing by a jury, a defendant should specifically request jury sentencing. It appears the mandatory language of "shall" means the jury verdict on punishment controls, subject only to a trial judge's options pursuant to 22 O.S.2011, § 991a, and following statues relative to powers of the trial court after sentencing.

¶6 In contrast, under 22 O.S.2011, § 927.1, where the jury finds a verdict of guilty, but fails to agree on the punishment to be imposed, or does not declare such punishment by their verdict, the trial judge shall assess and declare the punishment.

¶7 The sentencing powers of a trial court are set out by statute. There does not appear in our Court's jurisprudence any inherent constitutional power of a judge to modify a sentence rendered by a jury. If the Legislature desired trial judges to have that power, they could have set it out in statutes as they did in Section 982a. The only other statutory authorization for a court to modify a sentence is in 22 O.S.2011, § 1066, which provides this Court may modify a sentence on appeal. Instead of giving trial judges the authority to modify or change a sentence set out by a jury, the Legislature has provided options in Section 991a and the following statutes for a judge in the imposition of the jury verdict. That is the sum of the Legislature's grant of authority to trial judges in imposing a jury verdict. Because of this Court's imprecise and inconsistent language in prior decisions, the bench and bar have developed procedures inconsistent with the legislative mandates. This opinion gives the guidance needed to the bench and bar regarding the proper procedure to follow.

¶8 The jury in this case was given the option to assess a fine as part of their sentencing decision and they chose not to assess a fine. The trial judge was without authority to override that decision. I appreciate the Court providing the guidance needed to apply the plumb line set out in our statutes regarding the effect of a jury verdict in a criminal prosecution and ensures the imprecise wording in the past will no longer mislead the bench and bar as to the role of a jury in Oklahoma.

LEWIS, J., CONCURRING IN PART AND DISSENTING IN PART:

¶1 I concur in affirming the judgment and sentence, but respectfully dissent to vacating the fines, and to the Court's finding of plain error in the trial court's imposition of them. Title 22, O.S.2021, section 991a(A)(2) provides, with exceptions not relevant here, that when a defendant is convicted of a crime, the court may, among other things, "[i]mpose a fine prescribed by law for the offense[.]" The statute makes no distinction between cases tried to jury, before the court, or those adjudged guilty upon a plea. This legislative grant of authority to impose a fine as part of a sentence has persisted in versions of section 991a for over half a century. *See In Re Collyar*, 1970 OK CR 48, ¶ 8, 476 P.2d 354, 356-57 (recognizing trial court's section 991a authority to impose a fine).

¶2 Under Title 21 O.S.2021, section 64(B), "[u]pon a conviction for any felony punishable by imprisonment in any jail or prison, *in relation to which no fine is prescribed by law*, the court *or* a jury may impose a fine on the offender not exceeding Ten Thousand Dollars ($10,000.00) *in addition to the imprisonment prescribed*." (emphasis added). The general rule of Oklahoma law then is that upon conviction of a crime, *either* the court *or* a jury may impose a fine *in addition to* the authorized term of confinement as part of a lawful judgment and sentence.

¶3 Title 22 O.S.2021, section 926.1 is not to the contrary, for it provides only that the jury may, and upon request, shall, "assess and declare" punishment "within the limitations fixed by law"; and further, that "the court shall render a judgment *according to* [the jury's] verdict, *except as hereinafter provided*." (emphasis added). When a fine is one of the punishments fixed by law, a jury can certainly assess and declare one. But nothing in section 926.1 denies a *court's* power to impose a fine, not least because that very power over the pronouncement of judgment is "hereinafter provided" in section 991a(A)(2).

¶4 In *Fite v. State,* 1993 OK CR 58, 873 P.2d 293, the jury imposed a $100,000.00 fine allowed by statute. This Court reduced the jury's assessment to the $10,000.00 maximum under section 64, based on the spurious premise that a sentence of imprisonment enhanced under 21 O.S., section 51(B) "cannot be combined with" the fine provided by the substantive criminal statute, and thus reverts to the general fine of section 64. *See Fite,* 1993 OK CR 58, ¶¶ 7-8, 873 P.2d at 295.

¶5 The Court rejected this irrational aspect of *Fite* and other cases four years ago in *Bivens v. State*, 2018 OK CR 33, ¶¶ 17-19, 431 P.3d 985, 993-94. But the Court in *Fite* did manage to correct a major error by overruling the 1957 opinion in *Brown v. State,* 1957 OK CR 70, 314 P.2d 362, and re-affirming the trial court's *independent* authority to impose a fine under sections 64 and 991a.

¶6 And the Court did so without diminishing a trial court's obligation under section 926.1 to pronounce judgment according to the jury's verdict in other material respects:

> *Like § 991a*, § 64 should be given effect and the trial court should be allowed to impose an appropriate fine under § 64 *even when the defendant is sentenced to a term of imprisonment by the jury*. Of course, nothing in § 64, or in this opinion, *entitles the trial court to deviate from the term of imprisonment actually imposed by the jury*.

Fite, 1993 OK CR 58, ¶ 11, 873 P.2d at 295 (emphasis added). [1]

¶7 In this passage, *Fite* gave effect to all three sentencing statutes, reconciling the jury's initial authority to assess a fine at trial with the trial court's independent authority to impose a fine when pronouncing judgment, *even where the jury did not*. Any supposed conflict in these three statutes is an abstraction with no real world parallel: When a trial jury has assessed imprisonment and a fine, the court will pronounce the judgment as such. When the trial court imposes its own fine at sentencing, the jury has invariably not assessed one at trial. In the statutory scheme of things, neither the jury nor the court exceeds its own sentencing power, or appropriates a power exclusively reserved to the other.

¶8 The jury's power to assess punishment is revered, but it is not "fundamental." The limits of jury sentencing are a matter of legislative discretion. In the relatively few cases where it occurs, jury sentencing is bounded by statutes on the execution, length, modification, and administration of the sentence, as the majority's citations attest. The statutes also provide that if the

jury fails to agree on punishment, or simply omits to declare it in the verdict, its sentencing power is at an end, and the authority to sentence devolves on the trial court. 22 O.S.2021, § 927.1; *see also, Dew v. State*, 1912 OK CR 374, 126 P. 592, 593.

¶9 The majority's decision to overrule *Fite,* and the conflict in our unpublished decisions in this area, strongly imply that the Court is announcing a *new* rule of law, rather than correcting a deviation from law that should be plain or obvious to any reasonably informed jurist. We recently affirmed, without any negative comment on the matter, a case in which the *same* trial court imposed the *same* $600.00 fines when pronouncing judgment on the jury-assessed terms of imprisonment. If the practice condemned today is common, calling it "plain error" invites appellate and post-conviction litigation about fines never challenged in the trial court.

¶10 Respectfully, the better interpretation of the statutes is that the jury's omission to assess a fine exhausts its *own* authority to do so. The jury's omission of a fine is not an acquittal, and has no preclusive effect on the court's independent authority to impose a fine when pronouncing judgment. The convicted criminal has no enforceable expectation whether the jury or the court will impose a fine. Either court or jury is authorized to do so; *each* may act in its own appointed time. It is for the Legislature, not this Court, to say otherwise.

¶11 The convicted defendant's rights are respected when a fine is imposed in an amount allowed by law. That is due process. Common justice would condemn two fines for the same conviction; as would the prohibitions against multiple punishments for the same offense. Nothing like that is before us, and nothing in the imposition of these fines plainly or obviously violated the law. For these reasons, I respectfully dissent.

FOOTNOTES

HUDSON, VICE PRESIDING JUDGE:

[1] Metoyer is required to serve at least 85% of his sentences before becoming eligible for parole. 21 O.S.Supp.2015, § 13.1.

[2] Neither the first degree manslaughter statute (21 O.S.2011, § 715) nor the applicable enhancement statute (21 O.S.2011, § 51.1(B)) prescribed a fine as part of the punishment. The general fine provision in 21 O.S.2011, § 64(B) thus applied. *Id.* ("Upon a conviction for any felony punishable by imprisonment in any jail or prison, in relation to which no fine is prescribed by law, the court or a jury may impose a fine on the offender not exceeding Ten Thousand Dollars ($10,000.00) in addition to the imprisonment prescribed."). *See Fite v. State*, 1993 OK CR 58, ¶ 8, 873 P.2d 293, 295.

[3] *Howell*, *Luker* and *Fleming* interpreted and applied 22 O.S.1971 & O.S.1981 § 926 which was repealed in 1999 and replaced with 22 O.S.2021, § 926.1. There is no material difference in the language contained in repealed § 926 and § 926.1.

[4] Judge Lewis contends in his special writing that the trial court had authority to impose a fine because the jury did not assess one at trial. The problem with this approach is the jury's sentencing verdict in this case represents a conscious assessment and declaration in its verdict that the term of imprisonment specified, but no fine, shall be assessed as punishment. There is nothing ambiguous or incomplete about the jury's verdict. Neither the parties nor the trial court requested that the jury further consider or clarify the sentence it intended should be imposed because of perceived ambiguity or incompleteness in the sentencing verdict. *See* 22 O.S.2011, § 919 ("If the jury render a verdict not in form, the court may, with proper instructions as to the law, direct them to reconsider it, and it cannot be recorded until it be rendered in some form from which it can be clearly understood what is the intent of the jury."). The jury was not required by the instructions or the verdict form to write "zero fine" or "$0" on the verdict form to unambiguously assess and declare their view that no fine shall be imposed in this case. Instruction No. 31 told the jury simply: "When you have decided on the proper punishment, you should fill in the appropriate space on the verdict form and return the verdict to the Court." Each verdict form contained a blank line for the jury to write in the punishment it chose for each count. Jurors are presumed to follow their instructions. *Blueford v. Arkansas*, 566 U.S. 599, 606 (2012). Here, the jury's chosen punishment for each count--twenty years imprisonment--was written by the jury on the verdict form. To impose a fine at formal sentencing under these circumstances plainly contradicts the jury's verdict that no fine shall be imposed, only imprisonment. That is forbidden under the law.

[5] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

[6] To the extent Appellant complains that trial counsel was ineffective for failing to request an instruction on negligent homicide, this claim is so inadequately developed on appeal as to be waived from review. *See* Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022); *Knapper v. State*, 2020 OK CR 16, ¶ 89, 473 P.3d 1053, 1080.

LUMPKIN, JUDGE: SPECIAL CONCUR:

[1] *Wood v. State,* 1910 OK CR 224, 112 P. 11; *Webber v. State*, 1920 OK CR 208, 193 P. 48; *Ex parte Martindale*, 1930 OK CR 129, 287 P. 740; *Brown v. State,* 1957 OK CR 70, 314 P.2d 362 (overruled in *Fite v. State*, 1993 OK CR 58, 873 P.2d 293).

[2] *Hall v. State,* 1976 OK CR 76, 548 P.2d 649; *Webb v. State*, 1980 OK CR 83, 632 P.2d 428; *Swanson v. State,* 1987 OK CR 117, 738 P.2d 546; *Toles v. State*, 1997 OK CR 45, 947 P.2d 180; *Eizember v. State*, 2007 OK CR 29, 164 P.3d 208; *Bivens v. State*, 2018 OK CR 33, 431 P.3d 985

LEWIS, J., CONCURRING IN PART AND DISSENTING IN PART:

[1] This case presents no question at all about the jury's assessment of a sentence of imprisonment or the trial court's obligation to pronounce judgment according to such a sentence under section 926.1. One could surmise that the Court's opinion is about more than the humdrum subject of fines, but its broader pronouncements are necessarily ranked as *dicta.*

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1988 OK CR 249, 763 P.2d 1182,	THOMASON v. STATE	Discussed

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21 O.S. 51,	Repealed	Cited
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Title 22. Criminal Procedure

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22 O.S. 926,	Repealed	Cited
22 O.S. 982a,	Modification of Sentence - Time Limitation - Applicability - Report - Notice and Hearing - Appeal	Cited
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22 O.S. 994,	Suspension of Judgment and Sentence After Appeal	Cited
22 O.S. 1066,	Power of Appellate Court - Procedure When Case Reversed for New Trial - Duties of Court Clerk	Discussed

Title 47. Motor Vehicles

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47 O.S. 11-902,	Persons Under the Influence of Alcohol or Other Intoxicating Substance or Combination Thereof	Discussed
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47 O.S. 10-104,	Duty to Give Information and Render Aid - Drug and Alcohol Testing	Discussed